**NOS. 77-83**

# In the Supreme Court of the United States

OCTOBER TERM, 1945

UNITED STATES OF AMERICA
*v.*
PETTY MOTOR COMPANY

UNITED STATES OF AMERICA
*v.*
MERRILL J. BROCKBANK, DOING BUSINESS AS BROCKBANK APPAREL COMPANY

UNITED STATES OF AMERICA
*v.*
WILLIAM G. GRIMSDELL, DOING BUSINESS AS GROCER PRINTING COMPANY

UNITED STATES OF AMERICA
*v.*
CHARLES F. WIGGS, DOING BUSINESS AS CHICAGO FLEXIBLE SHAFT COMPANY

UNITED STATES OF AMERICA
*v.*
INDEPENDENT PNEUMATIC TOOL COMPANY

UNITED STATES OF AMERICA
*v.*
THE GALIGHER COMPANY

UNITED STATES OF AMERICA
*v.*
GRAY-CANNON LUMBER COMPANY

## PETITION FOR REHEARING

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### CITATIONS

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## PETITION FOR REHEARING

Come now the above named defendants, with the exception of Petty Motor Company and Merrill J. Brockbank, and respectfully petition for a rehearing and reconsideration herein upon the following grounds and for the following reasons:

1. The defendants herein were not tenants at will.

2. The defendants' tenancies never have been terminated under or as required by the Utah law pertaining to the termination of tenancies.

3. "Just compensation" should include a consideration of damages directly and proximately caused by the taking of the tenancies.

4. Regardless of any rule with reference to moving costs, these cases should not be reversed.

## I.

## THE DEFENDANTS HEREIN WERE NOT TENANTS AT WILL.

The opinion herein refers to the tenants as tenants at will (p. 7). Neither at common law nor under the Utah statutes were we tenants at will. At common law a tenancy at will expired at the death of the landlord, upon conveyance of the property, and many authorities hold that no notice to quit was necessary. A tenancy such as ours for an indefinite time with monthly or other periodic rent reserved does not terminate upon the death of the landlord or conveyance of the property, and a notice to quit is an essential requirement. 32 American Jurisprudence, pp. 83-88.

Under the Utah statute, 104-60-3 (2), the only change as to tenants at will from the common law is a definite provision requiring notice of five days to terminate them. The first part of the paragraph deals with tenancies such as ours, and the last part deals with tenancies at will.

These two tenancies have recently been construed by the Utah Supreme Court in cases cited in our former brief: *Buchanan v. Crites*, 106 U. 428, 150 P. (2d) 100, holding that a tenant at will can not be dispossessed even by the landlord without notice; and in *Carstensen v. Hansen* (not yet reported in the Utah Reports), 152 P. (2d) 954, holding that a landlord can not terminate the tenancy of those holding under an indefinite tenancy with monthly rental payments even by giving notice unless he complies strictly with the statute (104-60-6).

We were not tenants at will in any sense of the word,

and attaching to our tenancies the legal implications of tenants at will is wrong.

## II.

## THE DEFENDANTS' TENANCIES NEVER HAVE BEEN TERMINATED UNDER OR AS REQUIRED BY THE UTAH LAW PERTAINING TO THE TERMINATION OF TENANCIES.

Although for convenience only we have referred to our tenancies as month-to-month tenancies, that does not mean, under Utah law, as we pointed out in our former brief, that we had only a right of occupancy for a monthly period. Under Utah law, 104-60-3(2), our tenancies are specifically defined as tenancies "for an indefinite time with monthly or other periodic rent reserved".

The opinion herein seems to proceed upon the theory that the order to vacate given us by the trial court was the notice required to terminate tenancies by the Utah statute 104-60-6, in this language: "Some tenants of this group will not be entitled to anything, because the notice given them by the order of possession is more than the Utah statutory requirement." That is incorrect. None of the tenants has ever received any notice complying in any respect with the requirements of the Utah statute (*Carstensen v. Hansen*, supra, and 104-60-3(2) and 104-60-6, Utah Code Annotated, 1943). Our tenancies were not terminated under the Utah law regarding tenancies. The day after the action was filed the tenants were ordered to vacate their premises under an order to show cause in a condemnation proceeding. We were evicted by court order at the instance of a stranger to the title. Our tenancies were not terminated by notice from our landlord, and, as correctly stated by the trial court, under Utah law no one with the excep-

tion of the landlord or the successor to his estate may give the notice to terminate the tenancy. The opinion of the Court apparently adopts the argument of the Government that at best we had 15 day tenancies, and the entire discussion apparently proceeds upon this assumption. The fact is that we had the right to remain in our premises indefinitely, subject only to the landlord's right to terminate our occupancy by a proper notice properly given under Utah law. Our tenancies never have been terminated under Utah law, and so far as Utah law is concerned we are still tenants, dispossessed only by the power of eminent domain.

The duration of our tenancies is no mere technical assumption. The proof of the fact is the length of time these tenants occupied the property—as long as 26 years in some instances, not by sufferance, but under a valid existing lease. We are not dealing here with a transitory occupation or a temporary arrangement. These tenancies were substantial, of long standing and with unlimited terms so far as the United States is concerned. The United States took from us the right to remain indefinitely which we had exercised for years under leases recognized and protected by Utah law.

The case of *Emery v. Boston Terminal Company*, 178 Mass. 172, 185, cited by the Court in the footnote at p. 7, has no application here. We are not claiming anything under a theoretical renewal right. In our cases there was no question of renewal. Our tenancies had not expired and were not in danger of expiring. In the Emery v. Boston case, the tenancy terminated at a definite period with no legal right of renewal, merely the past custom and supposed intention of the landlord to cover any future term. It was for this non-existent future term damages were claimed. That is not even comparable with our leases.

The whole difficulty in our cases arises from the erroneous assumptions that we were tenants at will, that notice to quit had been given as required by law to terminate tenancies, and that our right of occupancy had a termination period renewable only upon "changeable intentions." None of these assumptions is right. Our tenancies were not unsubstantial, vague or intangible—they were of long duration, permanent, and continuing. All of this is overlooked.

The only way the United States got possession of our property was under the power of eminent domain. Now, to allow us to be dispossessed by that power and then allow us nothing more than token protection upon the theory that the taking itself limits the rights of the tenants, is literally to make the Fifth Amendment a means of confiscation and it in fact becomes "a sword instead of a shield". Whenever the condemnor is permitted to take property under the power of eminent domain and then permitted to escape anything but token payment because his own act in condemning is held to render the property taken of little value, then the Fifth Amendment is used to take the property and avoid payment for it. To say that the order of occupation acts as a landlord's notice to quit does exactly that.

The argument applies with great force also to the Independent Pneumatic Tool situation. Regardless of any provision in the lease concerning its termination, actually and as a matter of fact it was terminated by the condemnation proceedings, and not by the lease provisions. It would be terminated just as effectively had there been no such provision in the lease. So, to allow the condemnor who has terminated the lease to insist that he has not done that which he has done, and avoid payment for what he has taken, is again using the Fifth Amendment as a means of getting

possession of property and also as a means of avoiding payment for it. The lease provision was not made for the benefit of the condemnor and so far as he is concerned should be unavailing. His act ends the tenancy and for that act he should pay. The principle is well established that the doer of an act cannot escape its consequences because the person affected is otherwise protected. Unless confiscation is to result, "just compensation" as to tenancies such as ours which have no fixed term or marketability, must take into consideration the actual damage done by the taking.

## III.

## "JUST COMPENSATION" SHOULD INCLUDE A CONSIDERATION OF DAMAGES DIRECTLY AND PROXIMATELY CAUSED BY THE TAKING OF THE TENANCIES.

The Court declares that moving and relocation costs are relevant where only part of the term is taken but not when the entire term is taken, and yet states on p. 3, "When the shortening of the term is wholly at the election of the lessee (the United States here), the term of the leasehold for the purpose of determining the extent of taking must be considered to be its longest limit."

Thus in any case, including the General Motors case, if the United States takes the entire remainder of the term and also reserves the right of surrender at any or several prior periods, it takes the entire term and the tenant, including General Motors, can not have moving costs or costs of relocation considered because the entire term is condemned, despite the fact that the Government can terminate its occupancy at any time less than the full term and inflict without liability the same expenses and damages as it would have been liable for had only a yearly lease been

condemned. The same result follows if the period condemned is a shorter period with rights of renewal. Under the Court's opinion in this case, the Government by this method can determine for itself what it will pay. And hereafter it will never condemn for only a part of a term but always for the entire remaining term of the tenant, reserving rights to surrender, and thus actually inflict upon the tenant the wrongs that the General Motors case said would result in confiscation.

On pages 5 and 6 the opinion states, "We think the sounder rule under the federal statutes is to treat the condemnation of all interest in a leasehold like the condemnation of all interests in the fee. In neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee. The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of his leasehold covers the loss from the premature termination except in the unusual situation where it is a higher cost for present relocation than for a future." If by this statement the court means that the "market value" fiction must be applied to leaseholds which in most instances have no "market value", it would seem to be a repudiation of many prior statements of the Court, that where there is no market, some test other than market value must be used, which prior statements are recognized and approved in the General Motors case itself. One of such tests this Court has used in fixing just compensation is to determine what would be offered by one seeking the lease to one selling it in a fair transaction. Certainly moving and relocation expenses would enter into any fair transaction. These cases were cited in our former brief, but are not mentioned in the opinions. Obviously, there is no market value for the usual lease because

they are not sold on any market and there is no market demand for them. So if the opinion here stands, it means that in many cases leases will be taken without just compensation because no market for them exists. In fee condemnations this court has always allowed the value of improvements placed upon the property by the owner to be considered. Usually they go with the fee and are included in the compensation, whether the condemnor uses them, or not. They may be replaced from the compensation paid. The cost of removal and relocation of fixtures and equipment is but a means of determining their value or their replacement cost as a part of the lease premises. Certainly moving and relocating that which the taking renders useless, unless moved and relocated, is fair to consider in determining just compensation for the taking. Otherwise, the things that give value to the lease are lost because the condemnation makes them useless unless they are set up elsewhere. So applying the rule of fee condemnations is not just because the situation is entirely different.

It cannot be determined how "compensation for the value of his leasehold covers the loss from the premature termination" of the lease unless the damages sustained from such premature termination are to be considered. Those damages consist largely in the cost of moving and relocating. The value of the leasehold interest cannot be determined without taking into consideration its replacement value and cannot cover premature termination if the damages from that premature termination are not competent evidence. That the lessee might be required to move anyway at some future date (in our cases never so far as the United States is concerned) should not be considered, because it is the present condition that is relevant, not a future contingency, not even remotely prospective.

On page 6 the opinion says that the reason for allowing moving costs where only part of a lease is taken is because the lessee must return to the leasehold at the termination of the Government's use, citing the General Motors case. That is not the law in many states. Many states follow the rule that condemnation, whether partial or complete, voids the lease. This we pointed out in our former brief at pages 84 and 85 in discussing why termination clauses upon condemnation were placed in leases. The reason, therefor, given by the opinion for the allowance of evidence of moving costs in partial taking of a tenancy and not allowing such evidence in taking the entire tenancy, does not apply in many jurisdictions which control the property rights of the parties. As a matter of fact the loss and damage to the tenant is the same in both instances and its allowance in one case and rejection in the other is not just.

It seems to us that the difficulty arises from considering moving costs and costs of relocation "personal costs" or "consequential damages" where tenancies are concerned. With all due respect, we can not see that they have any elements justifying their classification as either personal or consequential. They are the direct, proximate, necessary, unavoidable result of the taking. They can be fixed, measured and determined exactly and accurately. They are caused by the condemnor and inflicted upon the condemnee, and would be taken into consideration by any fair minded person who desired to have the tenant move in order that he might occupy his premises. They affect and are a part of the value of the premises and a fair element to be considered. They are not the same as loss of business, loss of profits, good will, and the like, which do have elements of uncertainty and are in some degree intangible. No evi-

dence of such intangibles was received or considered in our cases.

This Court in the opinion here recognizes and in our humble judgment properly that just compensation includes damages, because it uses that word on p. 7 of the opinion as follows: "Upon a new trial, each tenant other than the Independent Pneumatic Tool Company, should be permitted to prove *damages* for the condemnation of its rights for any remainder of its term which exists after its ouster by the order of possession, but not costs of moving or relocation." (Italics added.)

There is no reason we can imagine, except a misapplication of the word "consequential", why damages for moving and relocation should be excluded from other damages allowable. They definitely in practice and as a matter of fact, are a part of the value of the tenancy, and there seems to be no good reason why the law of condemnation should not recognize what are the facts since after all what is just compensation as a matter of fact should be just compensation as a matter of law.

While the opinion permits damages for the remainder of the term which may exist under Utah law, in the next sentence it states that this in some instances will be nothing. Thus it seems to us that the opinion recognizes on the one hand that property has been taken, and then judicially declares that that which is taken need not be paid for. The trial court cannot allow damages under Utah law if it refuses damages to any of the tenants. Under Utah law, the requirement for notice to terminate our tenancies has never been given, regardless of words to the contrary, and condemnation is not a substitute for the requirements of Utah law to terminate tenancies. Now to permit it to be used as a substitute and to deny compensation for the dam-

age caused us, all language to the contrary notwithstanding, is such confiscation as the Fifth Amendment forbids.

There can be no practical objection to allowing evidence of the damage the Government does in dispossesing tenants. It has long been recognized by this Court and everyone else that where all the people take the property of one of the people for the benefit of all, the common requirements of justice and equity insist that the burden fall upon all the people who receive the benefit and not upon the individual who is injured. The argument is obliquely made by the Government that the cost to the Government would be tremendous. It is far better for the Government to pay for what it takes than to allow it to ruin thousands upon thousands of people by confiscating their property. The harm is immeasurably greater by making the individual bear the loss than it is by requiring the entire people to share the burden. And it is only fair and right to do so. To allow the Government to escape payment is to limit the words "just compensation" to less than their ordinary meaning, while to require the Government to pay for the damage it does by the taking is to give "just compensation" only its ordinary meaning. This does not give the words "just compensation" a meaning different than has been given to it by this Court from early times. It does not fix a value special to the owner or the condemnor, but allows to be considered those elements that necessarily would enter into a transaction between private individuals seeking to accomplish that which the condemnor accomplishes by means of condemnation. This Court has long held that "market value", strictly construed frequently cannot be applied, and other elements must be considered in determining "just compensation". But even under the "market value" rule, moving costs and costs of relocation would be considered by private individuals in a fair transaction in fixing the value of a tenancy.

While it is not intended to do so, the opinion now gives the Government the power to confiscate any tenancy it desires—those of indefinite term without paying any compensation, and those of fixed terms by condemning the total term, reserving surrender rights, paying only the rental value of the bare floor-space regardless of the way it has been equipped for the particular uses of the tenants, which equipment adds to and enters into its value in actual fact.

## IV.

## REGARDLESS OF ANY RULE WITH REFERENCE TO MOVING COSTS, THESE CASES SHOULD NOT BE REVERSED.

The Court on page 2 says: "The Government accepts a separate responsibility to compensate the tenants for any legally recognized interest which they may have in the property." The Court overlooks the fact that the Government made no such concession until it reached this Court. It contended below that it owed the tenants nothing. It refused to deal with them on any terms. It forced this lawsuit on us. And also in this Court, in spite of its acceptance of separate responsibility, the Government still insisted that it owed the tenants nothing. Certainly the trial court should not be reversed because the Government now adopts a position in this Court that it refused to adopt in the trial court. The trial court should not be reversed for rejecting a position which the Government itself now concedes was wrong.

Furthermore, the opinion is in error in stating on page 4 that the trial court permitted evidence "not only as to the value on the market of the use and occupancy, over and above the agreed rent, for any remainder of a term which may have existed in the respective tenants after they were

dispossessed, but also allowed evidence of the expenses incurred in moving and the reinstallation of equipment." The trial court did not do that. The evidence of moving and re-installation was offered only as it has a bearing upon the vlaue of the occupancy, not in *addition* to that value. The trial court time and again expressly told the jury that they were not to allow moving costs and the like, that they were not to give us our costs of relocation and our moving costs, and that the only thing the jury was to consider was, What was the value of our right of occupancy? Even if evidence of moving costs and costs of relocation should not have been admitted, no harm was done, because the jury did not allow them. The jury ignored the evidence of moving costs and the costs of relocation; and in no instance are they included in the jury's verdict. If this Court desires to announce as a rule that actual damages can not be recovered if they are embraced within the terms "moving costs and costs of relocation", it nevertheless should not reverse these cases, because those costs were not allowed in these cases. And at no time did the Government adopt the position, either in the trial court or in the Circuit Court, announced by this Court in its opinion here. These cases should not be reversed, because (1) the Government was concededly wrong below; and (2) the evidence objected to was disregarded by the jury. If this case is to be used as the means of announcing general rules, it can be readily so used without inflicting upon us additional hardships and burdens which always we have been powerless to avoid because of the attitude of the Government itself from the beginning of these cases.

## CONCLUSION

The net result of the opinion is that it permits an established business to be destroyed if the owner of the business

has not sufficient capital to reestablish himself. It seems a shocking thing to destroy an established business under the power of eminent domain and then say that nothing has been taken, which can be the result from the application of the opinion here. We have been damaged so seriously by the condemnation of our property that it seems inconceivable to us that we are to be denied any compensation, especially by a definition of just compensation that rejects realities and adopts a rule of narrow interpretation. In making the foregoing observation we are fortified by, and again repeat, this Court's prior declaration, that the right of "just" not unjust compensation is an incident to and inseparably connected with the power of condemnation; that this is a natural equity which commends itself to anyone and in no wise detracts from the power of the public to take, while on the other hand it prevents the public from loading upon one individual more than his just share, and that the Fifth Amendment says that when the individual surrenders to the public "something more and different from that which is exacted from other members of public, a full and just equivalent should be returned to him". This Court has uniformly held that the protections of the Fifth Amendment should be construed liberally: "A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance." If in these present cases the tenants are to be allowed only the bare floor space value of their tenancies, and the order to vacate considered as a substitute for a landlord's notice to quit, then indeed do our rights consist more in sound than in substance, the opinion having announced that some of us can recover nothing and the rest of us being entitled only to the value of the occupancy of a few meager days of a bare floor space, despite the fact that as a direct and proximate result of the taking our business homes have

been destroyed and we have been damaged irreparably. All the foregoing quotations are taken from the Monengahela case, 148 U. S. 312, and have been repeated many times by other decisions of this Court. The present opinion is the first within our knowledge to deny just compensation, because it is obvious that if some of the tenants of the group are entitled to nothing the rest of them are entitled to what amounts to practically the same thing. Regardless of any words to the contrary, our property has been confiscated and destroyed without compensation under the power of eminent domain. Never before has this been permitted in this country.

As the cases stand, we would be far better off if there were no Fifth Amendment. At least we would not have been dragged through three courts and now face the prospect of a fourth useless hearing. And the answer that "we need not go to a fourth hearing unless we want to", illustrates that the Amendment so far as we are concerned may exist "more in sound than in substance". As to us it may truly become both a snare and a delusion.

We therefore conclude with an additional quotation from the Monengahela case as follows: "It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon." There is nothing wrong or against the public welfare to allow to be taken into consideration in fixing the value of a tenancy, the cost of replacing that which is taken. Just compensation certainly should not be less than the value of the thing destroyed.

Respectfully submitted,

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# SUPREME COURT OF THE UNITED STATES.

Nos. 77-83.—October Term, 1945.

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| The United States of America, Petitioner,<br>77 *vs.*<br>Petty Motor Company.<br><br>The United States of America, Petitioner,<br>78 *vs.*<br>Merrill J. Brockbank, Doing Business as Brockbank Apparel Company.<br><br>The United States of America, Petitioner,<br>79 *vs.*<br>William G. Grimsdell, Doing Business as Grocer Printing Company.<br><br>The United States of America, Petitioner,<br>80 *vs.*<br>Charles F. Wiggs, Doing Business as Chicago Flexible Shaft Company.<br><br>The United States of America, Petitioner,<br>81 *vs.*<br>Independent Pneumatic Tool Company.<br><br>The United States of America, Petitioner,<br>82 *vs.*<br>The Galigher Company.<br><br>The United States of America, Petitioner,<br>83 *vs.*<br>Gray-Cannon Lumber Company. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[February 25, 1946.]

Mr. Justice Reed delivered the opinion of the Court.

This writ of certiorari under Judicial Code § 240 brings here for review certain problems relating to the just compensation for tenants in condemnation proceedings to take their entire leaseholds when the United States had already taken over the lessors' interest in the property which the tenants occupy. Cer-

tiorari was granted to consider the holding of the Circuit Court of Appeals, 147 F. 2d 912, affirming the judgments of the District Court, that evidence by a tenant of the costs of moving and reinstallation of equipment was admissible to establish the value of his leasehold under the rule announced in *United States* v. *General Motors Corporation*, 323 U. S. 373. As this issue presents an important phase of the law of eminent domain,[1] we granted certiarari. 325 U. S. 848.

These cases arise out of a petition for condemnation of the temporary use for public purposes of a building in Salt Lake City, Utah, filed November 9, 1942, which sought to take the use of the building for the Government through June 30, 1945, with the right of election upon the part of the United States to surrender the premises on June 30, 1943, or June 30, 1944, upon sixty days written notice to the owner.[2] The owner and tenants were parties defendant. An order for immediate possession was entered on November 11, 1942, subject to authorization to the tenants to continue their occupation of their premises for short periods which varied from six to twenty days.

While the condemnation proceedings were pending the owner of the property made arrangements with the United States which resulted in the dismissal of the action against the owner. There is no claim by the United States that this arrangement released it from liability to the tenants for its taking of their leaseholds. As the value of the use of the totality of property, which was taken, thus lost all meaning, the Government accepts a separate responsibility to compensate the tenants for any legally recognized interest which they may have in the property. See *Duckett & Co.* v. *United States*, 266 U. S. 149.

Although an earlier surrender might occur by the election of the United States, the estate sought did not necessarily expire until June 30, 1945. Prompt possession was required from the tenants and all of them "were required by the order of possession to vacate" the premises which they occupied within various short periods of which twenty days was the longest. The judgments stated the issue was the amount due the tenants for the taking of

[1] See United States v. 10,620 Square Feet etc., in Canadian Pacific Bldg., 62 F. Supp. 115.

[2] No one questions the authority of the United States to condemn this temporary interest. Second War Powers Act, 56 Stat. 177, sec. 201. United States v. General Motors Corporation, 323 U. S. 373.

their occupancy of their premises and found in dollars the just compensation for the rights taken. These facts, we conclude, resulted in the taking by the United States of the temporary use of the building until June 30, 1945. When the shortening of the term is wholly at the election of the lessee, the term of the leasehold for the purpose of determining the extent of the taking must be considered to be its longest limit.[3] All rights of all the tenants, except the Independent Pneumatic Tool Company, which is one of the respondents here, terminated before the end of the Government's lease by the lapse of time or in the case of the Tool Company by a "termination on condemnation" clause. With the exception of the Petty Motor Company and the Independent Pneumatic Tool Company, the tenants were tenants under oral contracts on a month to month basis. This entitled them only to notice of termination fifteen days prior to the end of a rental period. Utah Code Ann. (1943), Title 104-60-3(2). The Petty Motor Company held a lease which expired October 31, 1943, with an option for an additional year. Consequently its rights under its lease ended before those which the Government sought by its petition.

The lease of the Independent Pneumatic Tool Company included a clause for its termination on the Federal Government's entry into possession of the leased property for public use.[4] The events connected with the Government's entry just set out appear to meet the requirements for termination. This does not seem to be controverted. The contention of the Tool Company, as we understand it, is that the tenant is barred from claiming "any

[3] In United States v. General Motors Corporation, 323 U. S. 373, note 3, a different situation existed. While the estate there sought did not necessarily expire during the existing national emergency, the order for possession, the verdict and the judgment was for that part of the leasehold interest in the property extending from June 19, 1942, to June 30, 1943. We said: "The case now presented involves only the original taking for one year. If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded."

[4] The clause reads as follows:

"If the whole or any part of the demised premises shall be taken by Federal, State, county, city, or other authority for public use, or under any statute, or by right of eminent domain, then when possession shall be taken thereunder of said premises, or any part thereof, the term hereby granted and all rights of the Lessee hereunder shall immediately cease and terminate, and the Lessee shall not be entitled to any part of any award that may be made for such taking, nor to any damages therefor except that the rent shall be adjusted as of the date of such termination of the Lease."

of the award of the landlord" but that the condemnor is not relieved of liability to the lessee. This position seems inconsistent. If the Tool Company, with its termination on condemnation clause, was the only tenant and condemnation of all interests in the property was decreed, the landlord would take the entire compensation because the lessee would have no rights against the fund. There would appear to be no greater right where the landlord has been otherwise satisfied. Condemnation proceedings are in rem, *Duckett & Co.* v. *United States*, 266 U. S. 149; *United States* v. *Dunnington*, 146 U. S. 338, 350-54, and compensation is made for the value of the rights which are taken. *United States* v. *General Motors Corporation*, 323 U. S. 373, 379. The Tool Company had contracted away any rights that it might otherwise have had. We are dealing here with a clause for automatic termination of the lease on a taking of property for public use by governmental authority. With this type of clause, at least in the absence of a contrary state rule, the tenant has no right which persists beyond the taking and can be entitled to nothing.[5]

In order to inform the jury as to the value of the tenants' interests where there was a right to continue the occupation of their respective premises, the trial court permitted the introduction of evidence, over the Government's objections, not only as to the value on the market of the use and occupancy, over and above the agreed rent, for any remainder of a term which may have existed in the respective tenants after they were dispossessed, but also allowed evidence of the expenses incurred in moving and the reinstallation of equipment. The trial court's instructions made clear that the evidence was submitted to the jury not for a finding on the cost to the tenants of relocating their businesses but as an element in determining the "value" of their tenancies for that portion of their term which was left upon the termination of the lease. The admission of the evidence and its submission to the jury was approved by the Circuit Court of Appeals on the theory that consideration of such elements of cost

[5] See United States v. 10,620 Square Feet, etc., in Canadian Pacific Bldg., 62 F. Supp. 115; United States v. 8286 Sq. Ft. of Space, etc., 61 F. Supp. 737, 740-43; United States v. 21,815 Square Feet of Land, etc., 59 F. Supp. 219; United States v. 3.5 Acres of Land, etc., 57 F. Supp. 548; United States v. Improved Premises, etc., 54 F. Supp. 469, 472; Goodyear Shoe Machinery Co. v. Boston Terminal Co., 176 Mass. 115. Cf. United States v. Entire Fifth Floor in Butterick Bldg., 54 F. Supp. 258.

was compelled by the *General Motors* case. 323 U. S. 373. The Court of Appeals recognized that here the Government took the entire term of all the lessees except the Tool Company and possibly the Petty Motor Company but was of the opinion that the principles of the *General Motors* case applied when any leasehold was taken. 147 F. 2d 912, 914. In so holding, the Court of Appeals was in error.

The Constitution and the statutes do not define the meaning of just compensation. But it has come to be recognized that just compensation is the value of the interest taken. This is not the value to the owner for his particular purposes or to the condemnor for some special use but a so-called "market value." It is recognized that an owner often receives less than the value of the property to him but experience has shown that the rule is reasonably satisfactory. Since "market value" does not fluctuate with the needs of condemnor or condemnee but with general demand for the property, evidence of loss of profits, damage to good will, the expense of relocation and other such consequential losses are refused in federal condemnation proceedings. *Mitchell* v. *United States*, 267 U. S. 341, 344; *U. S. ex rel. T. V. A.* v. *Powelson*, 319 U. S. 266, 281; *Potomac Electric Power Co.* v. *United States*, 85 F. 2d 243; Orgel, Valuation under Eminent Domain, chap. V. For the purposes of these cases, it is immaterial whether the Government actually took the leaseholds of the tenants in addition to taking the temporary use of the fee or only destroyed the tenants' right of occupancy. If any property is taken, compensation is required. Cf. *United States* v. *Welch*, 217 U. S. 333.

There was a complete taking of the entire interest of the tenants in the property. It has been urged that to measure just compensation for the taking of a leasehold by its value on the market or by the difference between a fair rental as of the time of taking and the agreed rent, is unfair. It is said the unfairness comes from the fact that there is really no market for leaseholds; that their value is something peculiarly personal to the lessee.[6] The same thing is true as to incidental and consequential damages to the owner of a fee. We think the sounder rule under the federal statutes is to treat the condemnation of all interests in a leasehold like the condemnation of all interests in the fee. In

[6] See West Side Elevated R. R. Co. v. Siegel, 161 Ill. 638; McMillin Printing Co. v. Railroad Co., 216 Pa. 504.

neither situation should evidence of the cost of removal or relocation be admitted. Such costs are apart from the value of the thing taken. They are personal to the lessee.[7] The lessee would have to move at the end of his term unless the lease was renewed. The compensation for the value of his leasehold covers the loss from the premature termination except in the unusual situation where there is a higher cost for present relocation than for a future.

*United States* v. *General Motors Corporation* was a different case. In it only a portion of the lease was taken. We there said, p. 382:

> "When it takes the property, that is, the fee, the lease, whatever he may own, terminating altogether his interest, under the established law it must pay him for what is taken, not more; and he must stand whatever indirect or remote injuries are properly comprehended within the meaning of 'consequential damage' as that conception has been defined in such cases. Even so the consequences often are harsh. For these whatever remedy may exist lies with Congress."

There is a fundamental difference between the taking of a part of a lease and the taking of the whole lease. That difference is that the lessee must return to the leasehold at the end of the Government's use or at least the responsibility for the period of the lease, which is not taken, rests upon the lessee. This was brought out in the *General Motors* decision.[8] Because of that continuing obligation in all takings of temporary occupancy of

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[7] Compare United States *v.* Improved Premises, etc., 54 F. Supp. 469, 472; United States *v.* Entire Fifth Floor in Butterick Bldg., *idem*, 261; United States *v.* Certain Parcels of Land, etc., *idem*, 562; Wm. Wrigley, Jr., Co. v. United States, 75 Ct. Cl. 569; Thermal Syndicate, Ltd. *v.* United States, 81 Ct. Cl. 446, 454.

[8] 323 U. S. 373, 380, 383:

"The question posed in this case then is, shall a different measure of compensation apply where that which is taken is a right of temporary occupancy of a building equipped for the condemnee's business, filled with his commodities, and presumably to be reoccupied and used, as before, to the end of the lease term on the termination of the Government's use?"

"Some of the elements which would certainly and directly affect the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction would be the reasonable cost of moving out the property stored and preparing the space for occupancy by the subtenant. That cost would include labor, materials, and transportation. And it might also include the storage of goods against their sale or the cost of their return to the leased premises. Such items may be proved, not as independent items of damage but to aid in the determination of what would be the usual—the market—price which would be asked and paid for such temporary occupancy of the building then in use under a long-term lease."

leaseholds, the value of the rights of the lessees, which are taken may be affected by evidence of the cost of temporary removal.

Upon a new trial, each tenant, other than the Independent Pneumatic Tool Company, should be permitted to prove damages for the condemnation of its rights for any remainder of its term which existed after its ouster by the order of possession but not costs of moving or relocation.[9] The remainder which may exist will depend upon the Utah law on the requirement for notice to terminate the tenancies at will.[10] Some tenants of this group will not be entitled to anything because the notice given them by the order of possession is more than the Utah statutory requirement. The value of the remainder of the term of the Petty Motor Company's lease includes the value of the right to a renewal for a year, if such right continues under Utah law, as well as the value of the period ending October 31, 1943. The measure of damages is the difference between the value of the use and occupancy of the leasehold for the remainder of the tenant's term, plus the value of the right to renew in the lease of Petty, less the agreed rent which the tenant would pay for such use and occupancy.

*Reversed.*

Mr. Justice FRANKFURTER and Mr. Justice JACKSON took no part in the consideration or decision of these cases.

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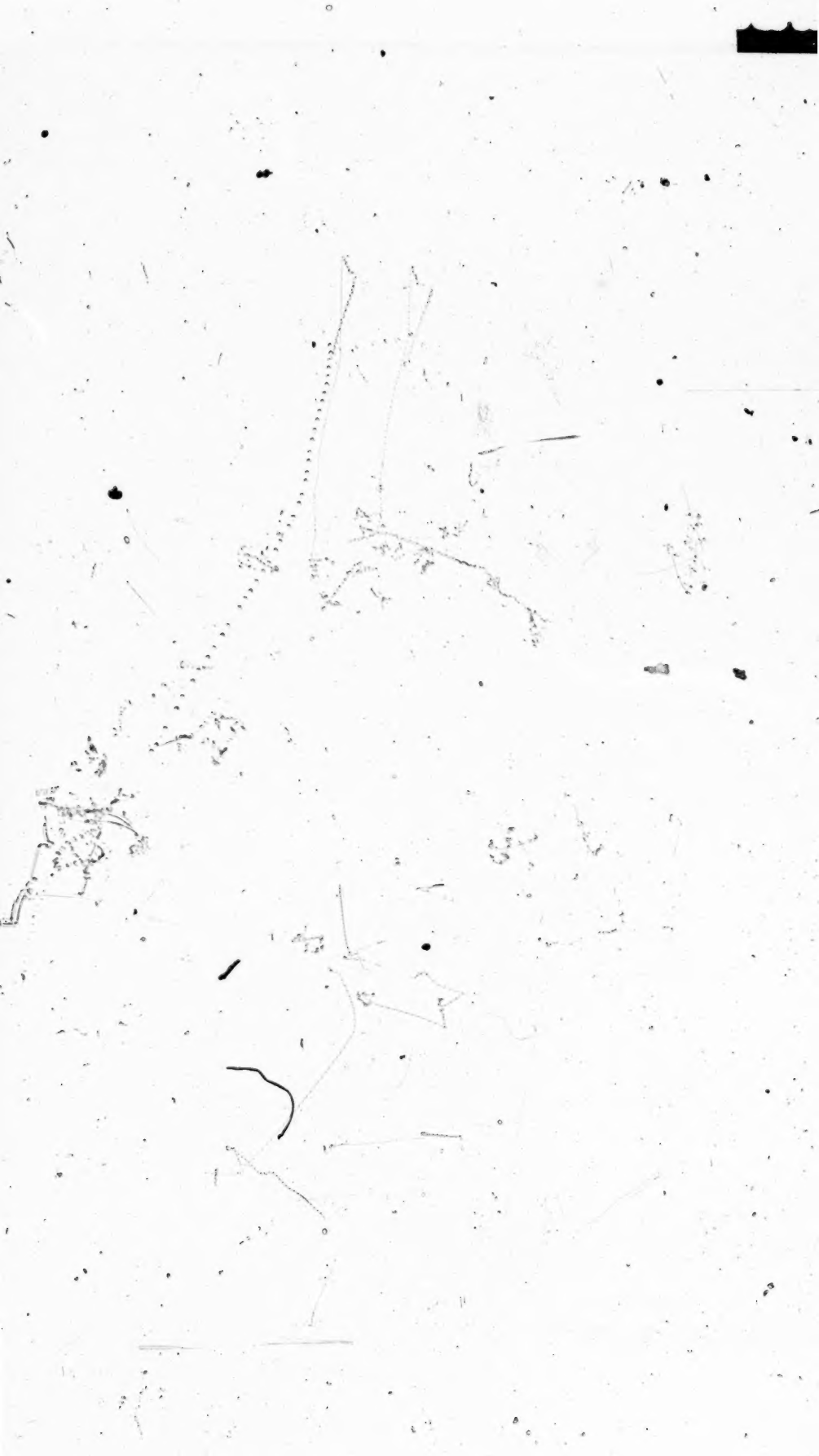
[9] The fact that some tenants had occupied their leaseholds by mutual consent for long periods of years does not add to their rights. Emery v. Boston Terminal Co., 178 Mass. 172, 185:

"It appeared that the owners had been in the habit of renewing the petitioners' lease from time to time, and an attempt was made to give this fact the aspect of an English customary tenant right. The evidence merely showed that the landlords and the tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. Even if such intentions added to the saleable value of the lease, the addition would represent a speculation on a chance, not a legal right. The court was right in excluding expert evidence as to an increase in value from that source."

[10] U. S. *ex rel.* T. V. A. v. Powelson, 319 U. S. 266, 279.



# SUPREME COURT OF THE UNITED STATES.

Nos. 77-83.—October Term, 1945.

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| The United States of America, Petitioner,<br>77 *vs.*<br>Petty Motor Company.<br><br>The United States of America, Petitioner,<br>78 *vs.*<br>Merrill J. Brockbank, Doing Business as Brockbank Apparel Company.<br><br>The United States of America, Petitioner,<br>79 *vs.*<br>William G. Grimsbell, Doing Business as Grocer Printing Company.<br><br>The United States of America, Petitioner,<br>80 *vs.*<br>Charles F. Wiggs, Doing Business as Chicago Flexible Shaft Company.<br><br>The United States of America, Petitioner,<br>81 *vs.*<br>Independent Pneumatic Tool Company.<br><br>The United States of America, Petitioner,<br>82 *vs.*<br>The Galigher Company.<br><br>The United States of America, Petitioner,<br>83 *vs.*<br>Gray-Cannon Lumber Company. | On Writs of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit. |

[February 25, 1946.]

Mr. Justice Rutledge, concurring.

I agree with the result and with the Court's opinion, but with an important reservation which I think should be made expressly.

In *United States* v. *General Motors Corp.*, 323 U. S. 373, the problem was stated as one of first impression, namely, to ascertain the just compensation the Fifth Amendment requires where, under

power of eminent domain, temporary occupancy of part of a leased building is taken from a tenant holding under a long term lease. The Court distinguished the case from others where the taking is of the owner's entire interest, whether a fee, a term of years or some other interest. Sensing the danger of applying to such a situation the strict rules limiting the amount of compensation in the latter types of cases, the Court said this would open a way for the Government to devise its condemnation, by chopping the owner's interest into bits, taking some and leaving him with others in suspended animation, so that the Amendment's guaranty might become an instrument of confiscation, not one of just compensation for what was taken. Such a procedure, the Court further stated, would be "neither the 'taking' nor the 'just compensation' the Fifth Amendment contemplates." 323 U. S. at 382.

The novelty of such a form of taking, together with the obviously confiscatory consequences, in a practical sense, for the owner, led the Court to hold that the usual measure of just compensation applicable when all the owner's leasehold is condemned, namely, payment of only the long-term rental of an empty building fixed by the terms of his lease or by market value, or less, would not suffice to compensate for carving out of the lease a right of "temporary use." Other elements were required to be taken into account as evidence of the value of what was taken.

These included (1) "what would be the market rental value of such a building on a lease by the long term tenant to the temporary occupier," 323 U. S. at 382, which in addition to the bearing of the long-term rental as one element would include as other elements affecting "certainly and directly . . . the market price agreed upon by a tenant and a sublessee in such an extraordinary and unusual transaction," 323 U. S. at 383, (2) the reasonable cost of moving out the property stored on the premises and of preparing the space for occupancy by the subtenant, including the cost of labor, materials and transportation; and possibly also the cost of storage of goods removed against their sale or the cost of their return to the premises. In addition, for fixtures and permanent equipment destroyed or depreciated in value by reason of the taking, the Court held that the tenant whose lease was so cut up was entitled to compensation as for property taken, under the settled rule of cited authorities. 323 U. S. at 383.

Finally, in a footnote the Court pointed out that after judgment the Government had been allowed to amend its petition so as to include in the interest taken a yearly right of renewal, after which the trial court entered a new judgment for the original figure. Stating that these facts were not taken to alter the question presented here, which involved only the original taking for one year, the Court went on expressly to rule: "If, on remand, the case be treated as involving the Government's option of renewal, the additional value of that interest must be included in the compensation awarded." 323 U. S. at 376, note 3.

Thus the Court applied a rule of compensation to the case of carving out a temporary or short-term use from a longer term very different from that generally applicable when the owner's entire interest is taken. The purpose and the basis for this were to give substance, in practical effect, to the Amendment's explicit mandate for payment of "*just* compensation" in cases of such extraordinary "takings" and to prevent those words from being whittled down by legalistic construction into means for practical confiscation.

In this case the Court has construed all of the takings as being of the tenant-owners' entire interests. This is clearly the case, on the record, with respect to all except Petty Motor Co. As to it I have doubt but I accept the Court's construction that the Government has condemned its entire leasehold interest in the premises and therefore must pay the full value of that term according to the usual rules in such cases.

My reservation, however, has to do with a possibility this record does not present as an accomplished fact in the case of the Petty Co., but does present as a contingency which might be realized and, in that event, would have a direct and inescapable relation to the ruling concerning the quantum of compensation in the *General Motors* case.

In that case the interest taken was for one year out of a twenty-year term which had six years to run from the time of the original condemnation. There was also added by the later amendment the right of renewal from year to year which, if exercised, might have extended the term taken to the end of the leasehold interest.

In this case a converse sort of taking is presented by the Petty Motor situation. That company held a lease expiring October 31,

1943, with an option for an additional year which if exercised would extend the term to October 31, 1944. The condemnation petition was filed November 9, 1942, when the Petty lease had almost one year to run in any event and two if the option should be exercised. The Government sought to take the use of the building through June 30, 1945, but with the option to surrender the premises on June 30, 1943, or June 30, 1944, on giving sixty days advance notice in writing.

It is this option which I think makes dubious the ruling that all of the Petty Motor Company's interest was "taken". In my opinion it was only "taken" contingently. For, if the option is valid, quite obviously the Government was free to surrender, by giving notice, on June 30, 1943, in which event Petty's lease would have been in force until the following October 31 in any event, or on June 30, 1944, in which case Petty's lease might have continued in force until October 31, 1944. In either event the case would have fallen squarely within the *General Motors* situation and ruling.

In my opinion that ruling and the requirement of paying compensation according to the measure it prescribes applies whether the Government carves out part of the tenant-owner's term by one method of stating what it takes or another. That is, for this purpose, it makes no difference whether the Government "takes" the temporary use for part of the term but adds to this a right of renewal periodically which if exercised will extend the term taken beyond the term of the lease; or, on the other hand, purports to take a term which extends beyond that of the leasehold interest, but reserves the right to cut this down periodically so that in fact it may surrender the premises before the leasehold expires and thus carve out of it a shorter term, just as in the *General Motors* taking.

Whether the chopping up is accomplished one way or the other, the effects for the owner are the same, the "taking" is in substance the same, and the compensation is required, under the *General Motors* decision, to be the same. That ruling cannot be avoided by inverting the length of the term specified and, correlatively, the character of the option added. Nor can it be avoided by construing the term taken, in view of the contingent option, in cases of the Petty type as including all of the interest of the lessee, if in fact the Government exercises the option and

surrenders the premises before the lessee's term expires. Upon such a showing the *General Motors* rule would apply and the owner-lessee would be entitled to recover compensation including all of the elements specified in that rule, subject only to making proof of them.

This question I think sufficiently important to be explicitly reserved for decision when a case arises requiring application of the *General Motors* rule to such a situation. I do not understand the Court to rule to the contrary, since there is no showing on this record that the Government has exercised its option. I therefore concur in the decision as it is rendered upon the record which has been presented.